No. 15717

IN THE

# United States Court of Appeals For the Ninth Circuit

VIRGINIA K. BOWER,

Appellant,

vs.

MABLE CLAIRE BOWER, also known as and called Mabel N. Bower,

Appellee.

## Brief of Appellee, Mable Claire Bower

Upon Appeal from the District Court of the United States, for the District of Montana

WILLIAM A. BROWN,
Helena, Montana,
Attorney for Appellee.

Filed....., 1958

..... Clerk.

FILED
JAN 31 1958

SUBJECT INDEX

## INDEX TO CITATIONS

No. 15717

IN THE

# United States Court of Appeals For the Ninth Circuit

VIRGINIA K. BOWER,

Appellant,

vs.

MABLE CLAIRE BOWER, also known as and called Mabel N. Bower,

Appellee.

## Brief of Appellee, Mable Claire Bower

Upon Appeal from the District Court of the United States, for the District of Montana

WILLIAM A. BROWN,
Helena, Montana,
Attorney for Appellee.

No. 15717

IN THE

# United States Court of Appeals For the Ninth Circuit

VIRGINIA K. BOWER,

Appellant,

vs.

MABLE CLAIRE BOWER, also known as and called Mabel N. Bower,

Appellee.

## Brief of Appellee, Mable Claire Bower

Upon Appeal from the District Court of the United States, for the District of Montana

WILLIAM A. BROWN,
Helena, Montana,
Attorney for Appellee.

### I.

### STATEMENT OF ISSUE

This is an appeal from a judgment of the lower court in which the cause was submitted upon an

agreed statement of facts. The two parties involved had been the wives of the late Joseph Edward Bower. During the time that the appellee and the husband were married he took out a life insurance endowment policy for Ten Thousand Dollars ($10,000.00) with the Western Life Insurance Company, naming his wife (appellee) beneficiary. They had two sons and a daughter. Realizing that they could no longer live together as man and wife, they entered into a divorce settlement agreement settling the care, custody and control of the children, making a property settlement and providing for costs and fees (Tr. pp. 22-23). The preamble of this agreement stated their "desire to settle and adjust amicably" (Tr. p. 22) all of their differences.

In paragraph VII of that agreement it was provided that the proceeds of the insurance policy would be divided equally, but that in the event the husband should die, all benefits should be payable to his wife (appellee). That same day, a supplemental agreement was entered into between the parties whereby they agreed that if one party did not institute the divorce proceedings within a certain specified time, then the other party had the right to do so (Tr. pp. 34-35).

Appellee obtained the divorce by default in October 1946. On December 7, 1949, the husband married the appellant, and immediately thereafter, made his second wife the beneficiary under

the policy. This was done without the knowledge of his first wife with whom he had made the contract of divorce settlement.

The husband died in September 1955, following which the two wives tried to collect the insurance policy. The Western Life Insurance Company brought an action in interpleader and deposited the proceeds of the policy with the Clerk of the lower court. The two wives litigated the question over whom was entitled to the money and on July 13, 1957, the Hon. W. J. Jameson, United States District Judge for Montana, made and entered his order herein finding that while the separation agreements were void as against public policy, nevertheless, paragraph VII which provided for the insurance policy as noted above, was severable. (Tr. pp. 31-45). Thereafter on August 19, 1957, the court made and entered its judgment accordingly.

At this point, we respectfully call the court's attention to the fact that this case was submitted on agreed statement of facts, and at no time during the course of this case has there been any argument as to these facts. Therefore, this case presents the simple question of whether Mable Claire Bower, the divorced wife and mother of the children, or Virginia K. Bower, the second wife who was not even a party to the divorce settlement contract, should receive the proceeds from the insurance policy.

## II.
## ARGUMENT

A. The agreement is severable.

That property settlement agreements may create a vested equitable interest in an insurance policy where sound equities exist in favor of the beneficiary, has long been a well settle rule in jurisprudence.

46 C. J. S. Sec. 1175, c (1) Pg. 71;

2 Appleman Insurance Law and Practice Sec. 922;

175 A. L. R. 1220

We call special attention to a decision from the Supreme Court of California that is strangely similar in its facts to the case here. The court decree was entered after a marriage settlement agreement was made, but after the decree of court, the insured wrote to his company telling them that he had been divorced, but that he wanted his estranged wife to remain the beneficiary. He did not use the word "irrecovably" and later he changed the beneficiary to his second wife. There the court held (as did Judge Jameson below) that the first wife had a vested equitable interest which could not be divested.

*Shoudy vs. Shoudy*
55 Cal. App. 344, 203 Pac. 433

The question is well stated in American Jurisprudence as follows:

"Equities may arise in favor of the beneficiary named in a life insurance policy which

will deny the insured the right to change the beneficiary, as, for example, where the insured, *for a valuable consideration, estops himself from changing his designation of the beneficiary.* (Emphasis ours).

29 Am. Jur. 1314, p. 983

*McDonald vs. McDonald*
(Ala.), 102, So. 38

*Thompson vs. Thompson*
156 F. (2d) 581

*Ratsch vs. Rengel*
180 Md. 196, 23 A. (2d) 680

Using the words of the lower court there can be no question that "factual distinctions between the instant case and those cited do no violence to the rule of law which is applicable here." (Tr. p. 40, the divorce settlement agreement is severable).

B. The Montana Cases.

We presume to cite the opinion of the lower court not only to sustain our arguments, but to provide this court with a very excellent brief of our contention. (Tr. pp. 31-47, 153 F. Supp. 25).

Appellant would make much of the holding of the lower court that the property settlement agreements are null and void and for this reason they are not severable. In support of this argument, the cases of Ryan vs. Ryan, 111 Mont. 104, 106 Pac. (2d) 337; Herrin vs. Herrin, 103 Mont. 469, 63 Pac. (2d) 137; Grush vs. Grush, 90 Mont. 381, 3 Pac. (2d) 402 are cited, apparently with the thought that they sustain appellant's argument

that the separation agreements cannot be severed. It seems strange that these same cases were cited with favor by the lower court to sustain the opposite conclusion.

For this reason, we quote these Montana cases again and point out in the words of the court, exactly what they mean. It is our position that the facts of the case here before the court come squarely under the decisions of the Grush, Herrin and Ryan cases cited above.

All three of these cases raise the point of severability of the contract. It was pointed out in the Grush Case (supra 388), that for the court to grant plaintiff the relief which he sought (to annul that portion of the divorce decree requiring him to pay alimony) "might serve to assist plaintiff in perpetrating a fraud upon defendant and thus the court become an instrument of injustice."

In the instant case, we must consider Virginia K. Bower in the same position as the late Joseph Edward Bower, because she is claiming the benefits of the insurance contract which resulted when he attempted to make her the beneficiary. But he lost the right to change the beneficiary when he signed the solemn separation contract with his first wife, Mable Claire Bower.

The court stated a similar situation in the Ryan Case, supra, as follows:

"In essence, this is defendant's position:

That he agreed to pay plaintiff the support money for the fraudulent purpose of obtaining a collusive divorce with defendant's assistance; that his promise had brought him the desired result but should now be held unenforceable as being against public policy and therefore void."

*Ryan vs. Ryan,* 111 Mont. 104 at 108.

The court goes on to answer this question by saying:

"In that case (Grush vs. Grush, 90 Mont. 381, 3 Pac. (2d) 402), this court said that the agreement savored of collusion and was opposed to public policy and a fraud upon the court, and that the decree if based upon it might be set aside by the court sua sponte; but that by sustaining plaintiff's motion and permitting the divorce decree to stand the court would in effect sanction his obtaining it by keeping plaintiff away from court by fraudulent promises to extrinsic fraud, and thus might serve to assist him in perpetrating a fraud upon the plaintiff and so make itself an instrument of injustice; that it could not justifiably annul the alimony provision and allow the divorce to stand; that public policy would not seem to require the annulment of the divorce, since neither party requested it and apparently if contested the only change would have been in the ascertainment of the offending party; that plaintiff under the circumstances, having accepted the benefit of the decree, could not be permitted to evade its burdens agreed to by him but should properly be left where he had voluntarily placed himself by agreement.

"Defendant contends that the Grush Case is not applicable here. But the only material difference is that in the Grush case the question of fraud was raised defensively to prevent the moving party from benefiting by the fraud,

whereas in this case it is raised affirmatively by the moving party for his own benefit. Certainly here, to say the least, the equities in favor of the wife are no less compelling than in the Grush Case."

*Ryan vs. Ryan,* supra, at page 109.

The question is finally and completely resolved by the Supreme Court of Montana in the Herrin Case. There the Court held definitely and without equivocation that such a contract as is here presented is severable.

*"But we think it repugnant to sound principles of equity to permit one to profit by the provisions of such an agreement and then avoid its objectionable parts by invoking the rule mentioned, and we therefore hold the contract to be separable.* This conclusion is one of first impression in this jurisdiction in actions of this nature so far as our research reveals; but there is authority for such a rule in actions at law, (Mattison v. Connerly, 46 Mont. 103, 126 Pac. 851; Purdin v. Westwood Ranch & Livestock Co. 67 Mont. 553 Pac. 326; United States Building & Loan Assn. v. Burns, 90 Mont. 402, 420, 4 Pac. (2d) 703), and we think such a holding is fair and equitable and does substantial justice between the parties. The contract is therefore held to have been entered into for the purpose of facilitating a divorce, and as to that it is void as contrary to public policy, but as to the property settlement it is valid and binding upon both parties." (Emphasis ours).

*Herrin vs. Herrin,* supra at 473

It appears that any further citation of authority would unreasonably burden the court.

## III.
## CONCLUSION

Stripped of all of its verbiage, this case becomes comparatively simple. Joseph Edward Bower and his first wife signed a contract stating that they were having marital difficulties, and that they wished to settle all of their differences over property, alimony and custody of their children amicably.

A supplemental agreement was executed by the parties on the same date as the original and provided that if the first wife did not institute divorce proceeding by a certain date, the husband could do so.

The prime agreement in paragraph VII set forth the existence of the insurance policy here under discussion which stated how its proceeds should be disposed of. The court held the separation agreements to be null and void, but further held that paragraph VII was severable and that it created a vested equitable interest to the proceeds of the insurance policy in Mable Claire Bower.

We therefore respectfully submit that the proceeds of the policy deposited with the lower court are by law the property of the appellee, and that the decision and judgment of the lower court should be affirmed.

Respectfully submitted,
WILLIAM A. BROWN,
Attorney for Appellee.